IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6840 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SURESHBHAI BABULAL DAVE BROTHER OF DETENUE

Versus

DISTRICT MAGISTRATE

Appearance:

MR NM KAPADIA for Petitioner

MR KT DAVE, AGP, for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 21/03/2000

ORAL JUDGEMENT

1. The District Magistrate, Mehsana, passed an order on August 27, 1999, in exercise of powers under Section 3(1) of the Gujarat Prevention of Anti-Social Activities Act, 1985 ("PASA Act" for short), detaining the detenu-Rajnikant @ Rajiya Babulal Dave of Mehsana under

the provisions of the said Act.

2. The detaining authority took into consideration six offences registered against the detenu under the Bombay Prohibition Act. The authority also considered statements of three anonymous witnesses recorded on 7th, 8th and 9th August, 1999 and came to conclusion that the detenu is a bootlegger. His activities are detrimental to public order and, therefore, he is required to be immediately prevented from pursuing his activities. The authority considered the possibility of resorting to less drastic remedies for the purpose, but came to conclusion that resorting to less drastic remedies may not yield the results of immediately preventing the detenu from pursuing his activities and, therefore, detention under the PASA Act is the only efficacious remedy that can be resorted to.

3. The detenu has challenged the order of detention on various counts. The main ground being that there is mechanical exercise of powers under Section 9(2) of the PASA Act by the detaining authority. The petitioner has alleged legal mala fides against the detenu by stating that the "public interest" is a term which is frequently used by the detaining authority since last 2/3 years and powers under Section 9(2) of the Act are exercised by the detaining authority to shield bogus and fictitious persons or men of police. The privilege is claimed by the detaining authority for the ulterior motive of circumventing the unfolding of credibility of witnesses and, therefore, the exercise of powers is arbitrary, mala fide and not genuine. This would be violative of Articles 21 and 22(5) of the Constitution, as it eclipses the right of the detenu of making an effective representation. Apart from this, the ground of delay in considering the representation is also made out. The third ground is non-supply of material documents, though requested for.

3.1 Mr. Kapadia, learned advocate appearing for the petitioner, submitted that the verification by the detaining authority is nothing but reiteration of the statements of the witnesses recorded by the sponsoring authority. There is nothing to indicate that there was, in existence, some independent, cogent and contemporaneous material which was considered by the detaining authority to arrive at a satisfaction about the genuineness of the fear expressed by the witnesses. Mere assertion by the witnesses about fear before the sponsoring authority and even before the detaining authority may not be considered to be of any virtue.

There has to be some material to support the assertion of the witnesses for satisfying the detaining authority about the genuineness of the fear expressed by the witnesses and, therefore, the subjective satisfaction recorded by the detaining authority and exercise of powers by the detaining authority under Section 9(2) of the PASA Act cannot be considered as genuine or proper. The detention, therefore, would be bad in law. The petition may, therefore, be allowed.

3.2 Mr. Kapadia has placed reliance on a decision of a Division Bench of this Court in the case of Samant Gogan Mer v. State of Gujarat, Special Civil Application No.155 of 1994, decided on 11/10/1994 (Coram: N.J. Pandya and D.G. Karia, JJ.). He has also placed reliance on the decision of a Division Bench in the case of Bai Amina v. State of Gujarat, as reported in XXII GLR 1186.

3.3 Mr. Kapadia, therefore, submitted that the detaining authority has not come out with any affidavit in reply stating what was the material considered by the detaining authority while considering the question of correctness and genuineness of the statements of the witnesses and exercise of powers under Section 9(2) of the PASA Act in respect of such witnesses.

4. Mr. K.T. Dave, learned Assistant Government Pleader, has opposed this petition. He submitted that the detaining authority has verified the statement. It is the subjective satisfaction and, therefore, the sufficiency or insufficiency of material before the detaining authority for exercise of powers under Section 9(2) cannot be examined by this Court in such petition. The petition may, therefore, be dismissed.

5. Having regard to rival side contentions, it may be noted at the outset that the statements of witnesses were recorded by the proposing authority on 7th, 8th and 9th august, 1999. The same have been verified on 9th August, 1999 by the Dy.S.P. and by the detaining authority on 20th August, 1999, by putting an endorsement in the margin of the statement, as is evident from the xerox copy placed on record by Mr. Kapadia, which was supplied to the detenu along with the grounds of detention.

5.1 Barring the endorsement below the statements of anonymous witnesses, there is nothing to indicate the correctness and genuineness of the statements and fear expressed by the witnesses, which has been accepted by

the detaining authority to be so. The detaining authority has not filed any affidavit in reply and, therefore, this Court is at loss to know whether there was any material other than the bare statements of the witnesses for recording subjective satisfaction.

5.2 If the verification is seen, it is to be noted at the outset that it becomes legible with strain. Assuming that it is legible, as expected, it indicates that the verification is one line verification about the genuineness of fear expressed by the witnesses, which can be translated thus:

"The witness is identified by P.I., LCB, Mehsana.
I have personally verified the correctness of the statement of this witness. The witness has voluntarily stated the details of time, date and place of incident in his statement dated 8.8.99 before P.I., LCB. The witness has asked to keep his name, address, age and vocation secret because of fear of detenu.

Place: Mehsana Sd/-
Date:20.8.99 (H.B. Variya)
District Magistrate,
Mehsana."

5.3 A plain reading of the above endorsement by the detaining authority indicates that request of the witness for not disclosing his identity out of fear of the detenu emerges in one sentence. Whether that re-assertion of the witness, at this stage, is really genuine or not is what is supposed to be verified by the detaining authority. If that is not done, the very purpose of exercise undertaken by the detaining authority before claiming privilege under Section 9(2) would be marred. It would be prudent to expect the detaining authority to cross-check the assertion by such witnesses to rule out the possibility of a false allegation/assertion, may be out of personal vendetta or may be for some other reasons as this is likely to adversely affect the liberty of an individual. The verification itself means that the authority has to examine the assertion for its genuineness which can be by cross-checking or by referring to some other contemporaneous material cogent and reliable in nature and, if that is not done or if that part is missing, the very purpose of verification by detaining authority would be frustrated. In this regard, the decision in the case of Bai Amina (supra) can be referred to. While considering this question, the Division Bench observed as under :-

"If the disclosure of the particulars and materials and the sources from which they are obtained is not to be made on the ground of promise of confidentiality made to the informant in view of his apprehension that he would be visited with dire consequences if the detenu came to know that he was the source from which the particulars and materials were gathered, the detaining authority must be fully satisfied that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. The general background, character, antecedents, criminal tendency or propensity, etc. of the detenu and such of those matters as are relevant in the context of the informant must be inquired into and carefully examined by the detaining authority with a view to satisfying itself that the alleged apprehension is not imaginary or fanciful or that it is not merely an empty excuse invented by the informant, inter alia, to protect himself against the falsity of his version being exposed by an effective explanation of the detenu or to hide his own involvement or to conceal his enmity with the detenu. The detaining authority must be further satisfied that the promise of protection against reprisal would not be an effective substitute for the promise of confidentiality and that unless confidentiality is guaranteed, material information would not come forth making it impossible to exercise of power of detention."

In the above decision, a Division Bench of this Court specifically stated that bald assertion regarding non-disclosure being in public interest will not conclude the issue when exercise of privilege is challenged as mala fide, as is the instant case. The Division Bench said that the detaining authority must file an affidavit to satisfy the Court regarding application of mind and bona fide exercise of powers. The Court observed:

"Indeed, having regard to the seriousness of the question involved, the detaining authority would be well-advised to make a contemporaneous record of the grounds and reasons which weighed with it in withholding the documents, materials and particulars."

5.4 In Mohmad Sarif v. Commissioner of Police, 1997 (1) GLH 1017, this Court held that in absence of affidavit by the detaining authority and/or contemporaneous record to show that the authority applied its mind, mere reproduction of statements in order is not sufficient to uphold the detention.

5.5 In Chandrakant N. Patel v. State of Gujarat, 1994(1) GLR 761, a Full Bench of this Court said that the decision and the ratio laid down in Bai Amina's case (supra) is a good law.

6. The outcome of the above discussion is that in absence of any affidavit by the detaining authority, it is difficult to know whether there was application of mind by the detaining authority because the verification by the detaining authority reflects only re-assertion of fear by the witness whose identity has not been disclosed. There is no material made available to the Court contemporaneous in nature to indicate undertaking of exercise by the detaining authority to ascertain and satisfy itself about the genuineness of the fear expressed by the witnesses. Thus, from what is placed before this Court, it appears that verification of the witness, as translated, was the only material before the detaining authority for recording subjective satisfaction about the genuineness of the fear expressed by the witness leading to exercise of powers under Section 9(2) of the PASA Act. There is nothing to indicate any exercise having been undertaken by the detaining authority to weigh the right of the detenu of making a representation envisaged under Article 22(5) of the Constitution of India vis-a-vis the public interest. The detaining authority is expected to strike a delicate balance between these two public interests before exercusing the powers under Section 9(2) of the PASA Act. As a result, in view of this Court, the exercise of powers under Section 9(2) of the PASA Act, claiming privilege, cannot be said to be proper. This would adversely affect the right of the detenu of making an effective representation.

6.1 It may be noted that, in the instant case, there is nothing to indicate that the detaining authority, while exercising powers under Section 9(2) of the PASA Act, examined the aspects of general background, character, antecdents, criminal tendency or propensity, etc. of the detenu and, therefore, in absence of an affidavit by the detaining authority, it is not possible to uphold the detention which is based on a verification,

which is nothing more than reiteration of the fear expressed by the witness qua the detenu which was expressed by the witness before the proposing authority also.

7. At this stage, the argument of Mr. Dave, learned Assistant Government Pleader, that sufficiency or insufficiency of the material before the detaining authority for arriving at subjective satisfaction may not be examined by this Court may be considered. There cannot be any two opinion or dispute about the fact that this Court is not supposed to enter into the arena of examining the question of sufficiency or insufficiency of grounds for recording a satisfaction for the need for exercise of powers under the provisions of the PASA Act. But what is being considered by this Court is the procedure adopted by the detaining authority for recording a satisfaction about the need for exercising the powers under Section 9(2) of the PASA Act and not the sufficiency or insufficiency of the material. Whether it would be proper and prudent for the detaining authority to rely only on re-assertion of a witness about fear expressed by him qua the detenu is the question that is being considered and addressed to. It is a procedural defect which is noticed by this Court. There appears not any contemporaneous material which was considered by the detaining authority while exercising powers under Section 9(2) nor does there appear any contemporaneous record made by the detaining authority. For these two reasons, the satisfaction of the detaining authority for claiming privilege on basis of genuineness of the fear expressed by the witnesses cannot be considered as proper. This improper exercise of powers has affected the right of the detenu of making an effective representation and, therefore, the petition deserves to be allowed.

8. It may be noted that the grounds of detention do not indicate as to what was the factor that weighed with the detaining authority for the need for exercise of powers under Section 9(2) nor there is any contemporaneous material to indicate application of mind by the detaining authority on this question. In this view of the matter, the petition deserves to be allowed.

9. In view of the above discussion, the petition is allowed. The impugned order of detention dated August 27, 1999, passed against the detenu is hereby quashed. The detenu-Rajnikant @ Rajiyo Babulal Dave is ordered to be set at liberty forthwith, if not required in any other matter. Rule is made absolute with no orders as to costs.

[A.L. DAVE, J.]

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